

REMARKS

Claims 1-21 are pending. Claim 1 has been amended by this Response. Claims 2-21 remain unchanged by this Response. Reconsideration in light of the amendment, the evidence provided by the Affidavit of Colin Pace attached hereto as Exhibit A, and the following remarks is respectfully requested.

Claim Rejections -- 35 U.S.C. §102

Examiner maintains the rejection of Claims 13 and 19 under 35 U.S.C. §102(b) as being anticipated by each of *Olliver*, US Patent No. 2,910,365; *Waitman*, US Patent No. 3,367,784; *Gordon*, US Patent No. 2,629,665; and *Baker*, US Patent No. 2,605,188. These rejections are respectfully traversed. Applicant has pointed out that Examiner evidently takes the position that the product in the product-by-process claim of Applicants' invention of Claims 13 and 19 is the same as the product produced by the *Olliver*, *Waitman*, *Gordon*, and *Baker* prior art. In response, Examiner asserts that no official notice in this regard has been taken but, rather, "Examiner has asked for a showing as to how the claimed product differs from that of the prior art." Yet, such inquiry assumes that the claimed product is the same as the prior art. In other words, why is it that Applicants must provide evidence that the claimed product is different from the prior art unless the Examiner has some evidence that the claimed product is the same as the prior art? Applicants do not merely claim a food sauce but, rather, claim a product made by the process of Claims 1 and 14. Either Examiner is ignoring this limitation or Examiner is taking official notice that the product produced by the prior art references is the same as the product produced by Claims 1 and 14. As previously noted, the MPEP does not allow Examiner to take either position.

Applicants have also detailed in their response to Examiner's Office Action of November 29, 2005, the evidence contained within the prior art references themselves that demonstrate that the product made by Applicants' process is different from the product made by the prior art references. Nothing more should be required of Applicants at this time in order to overcome the rejections of Claims 13 and 19 on these grounds.

Nonetheless, in order to advance the issuance of Claims 13 and 19, Applicants have further demonstrated how the process claimed creates a product different from that of the prior art by way of the attached Affidavit of Colin Pace. (Ex. A, ¶5). In light of all of the above, Applicants respectfully request that the Examiner withdraw the rejection of Claims 13 and 19.

Claim Rejection -- 35 U.S.C. §103

Examiner rejected Claims 1, 8, 14, and 15 under 35 U.S.C. §103(a) as being unpatentable over *Olliver*, US Patent No. 2,910,365. This rejection is respectfully traversed.

In the previous Office Action, Examiner asserted that *Olliver* discloses "heating a liquid fraction to at least 140°F (milk is inherently pasteurized at such a temperature) [and] mixing the aqueous pectin solution with the liquid fraction" In response, Applicants pointed out that a limitation of step (c) of Claim 1 requires the mixing of the aqueous pectin solution with a heated liquid fraction of step (d). Applicants further noted that not only is this limitation not disclosed by the *Olliver* Patent, but the *Olliver* Patent specifically teaches away from mixing a pectin solution with a heated liquid fraction containing calcium. *Olliver* teaches in Column 1, at Lines 24-30, that an object of the *Olliver* invention is "to provide a liquid pectin-containing composition which is adapted to be made relatively quickly into a milk-containing table jelly by the simple step of merely admixing the composition with milk at room temperature without the application of heat." (Emphasis added.) Further, in Claim 1 of the *Olliver* Patent in Column 5,

at Lines 6-10, the *Olliver* Patent specifically requires that the milk (which Examiner asserts is a liquid fraction comprising soluble calcium) is mixed with the aqueous pectin solution "without heating."

In the instant Final Office Action, Examiner responds to all of this by asserting that "while the claim language requires that the liquid fraction be heated, it does not require that it still be heated at the time it is combined with the pectin solution." Such limitation was in fact intended by Applicants, but perhaps not precisely communicated. Consequently, Claim 1 has been amended by this Response to read that the aqueous pectin solution is mixed with "said hot liquid fraction of step (b)" (Emphasis added.) Such clarifying amendment clearly distinguishes Applicants' claimed invention from the *Olliver* reference with regard to Claims 1 and 8. Such an amendment makes it clear that *Olliver* cannot be used in combination with any other prior art as applied to date by Examiner, thus clearly placing claims 1-12 in a condition for allowance on this basis alone.

In response to the previous Office Action, Applicants pointed out that the *Olliver* reference does not disclose the order of the method steps claimed by Applicants. Examiner now acknowledges this point and, consequently, has withdrawn 35 U.S.C. §102 rejections based on *Olliver*. Examiner now asserts, however, that the same claims can be rejected based on 35 U.S.C. §103 despite the fact that *Olliver* does not claim method steps in the same order as those claimed by Applicants. Examiner's position in this regard, in light of the assertion by Applicants that the order of the method steps in Applicants' invention is critical to producing the desired product, is not legally supportable. For example, in *Loral Fairchild Corp. v. Sony Corp.*, 181 F.3d 1313, 50 USPQ 2d 1865 (Fed. Cir.) *reh'g denied*, 1999 U.S. App. LEXIS 18480 (1999), the Federal Circuit found that the order of Loral's six step process was significant to patentability

based on Loral's own arguments during prosecution. Sony's process performed all the claimed steps, but in a different order. In overcoming a §103 rejection, *Loral* referred to the process sequence of its claim. This "indicate[d] that the applicant intended a specific order to the process steps in the claims." *Id.* at 1326. See also *Ex parte Baril*, 124 USPQ 509 (Bd. Pat. App. 1958). Consequently, in accordance with the clear case law on point, Applicants have met the burden of overcoming Examiner's rejections under both 35 U.S.C. §102 and §103 by pointing out during prosecution that Applicants' method steps must be performed in the order presented in order to achieve the results desired.

Although by no means required, Applicants further refer Examiner to the Affidavit of Colin Pace, attached hereto as Exhibit A, wherein specific evidence demonstrates the new, unexpected, and useful function resulting from the required order of Applicants' steps. (Ex. A, ¶5.) Consequently, Claims 1, 8, 14, and 15 are now clearly in a condition for allowance.

Examiner continues to maintain a rejection of Claims 12 and 18 under 35 U.S.C. §103(a) as being unpatentable over *Olliver*, US Patent No. 2,910,365. Applicants continue to traverse this rejection on the grounds set forth in their Response to Office Action Mailed on November 29, 2005. Further, in light of the amendment to Claim 1, the evidence presented in the Pace Affidavit, and the argument detailed herein, Applicants have already shown that *Olliver* cannot be used to support a rejection of any of Applicants' claims as presently pending.

Examiner rejects Claims 1, 14, and 15 under 35 U.S.C. §103(a) as being unpatentable over *Waitman*, US Patent No. 3,367,784, in view of *Gordon*, US Patent No. 2,624,665, and *Olliver*, US Patent No. 2,910,365. For the reasons set forth previously by Applicants and as set forth below, this rejection is respectfully traversed. Applicants believe that the amendments, evidence, and arguments presented above with regard to the *Olliver* reference remove the *Olliver*

reference as prior art either alone or in combination with *Waitman* and *Gordon*. For this reason alone, Claims 1, 14, and 15 are now in a condition for allowance.

Further, Examiner continues to propose the combination of the teachings of the preparation of a shelf-storable gel composition (*Waitman*) with another method for making dietetic foods (*Gordon*) with a further method for making table jelly (*Olliver*). Each one of these prior art disclosures lists specific processing steps and ingredients with few similarities between the methods other than the use at some point of a low-methoxyl pectin. Applicants assert that it is improper for Examiner to pick and choose specific ingredients and processing steps taken out of context from these three divergent teachings in support of an obviousness rejection of Applicants' claimed invention. It has long been established that the motivation is lacking where the proposed modification would destroy the intended function of the reference. *See, In Re Fritch*, 972 F.2d at 1265 n. 12, 23 USPQ 2d at 1738 n. 12 ("A proposed modifications [is] inappropriate for an obviousness inquiry when the modification render[s] the prior art reference inoperable for its intended purpose."); *In Re Ratti*, 270 F.2d 810, 813, 123 USPQ 349, 352 (CCPA 1959) (holding the suggested combination of references improper under Section 103 because it "would require a substantial reconstruction and redesign of the elements shown in [a prior art reference] as well as a change in the basic principles under which [the references'] construction was designed to operate.") For example, Examiner attempts to combine the concept of using fresh fruit as disclosed by *Olliver* with *Waitman* in order to address the limitation of maintaining the fruit component in the mixture at a temperature below which cooking of the fruit component will occur. Yet, *Olliver*, unlike *Waitman*, specifically requires that the entire mixture not be heated. "According to the invention, I provide an aqueous low-methyl pectin-containing composition adapted to be made into a table jelly by simple admixture with milk without heating

comprising an aqueous solution containing low-methyl pectin substantially completely disbursed therein" (Col. 1, Lns. 31-36). It is difficult to understand how this teaching can be combined with a method that requires that the mixture be heated to 190°F during mixing. (See *Waitman*, Example 1). Particularly difficult to understand is how this combination can be cited as an obvious combination for refraining from cooking fresh fruit when the art used to provide the element of fresh fruit prohibits cooking while the art it is combined with teaches cooking.

A similar problem arises with Examiner's attempted combination of *Gordon* with *Waitman* and *Olliver*. *Gordon* provides a single mixture which includes low-methoxyl pectin and calcium. Yet, *Waitman* requires two separate mixtures, a first mixture having the pectin and a second mixture having a source of calcium. Both of the mixtures in *Waitman* are heated prior to combination. None of these teachings comport with the recipe disclosed by *Gordon*.

In response, Examiner asserts that "all of the references relate to food sauces comprising low-methoxyl pectin, calcium, and fruit, and as such, are deemed to be in the same field of endeavor." Such is not the test, however. That the art may be in the same field of endeavor may be relevant had Applicants asserted that the art was non-analogous, but does not justify the combination of art that teaches in different directions in many substantial aspects.

The other justification Examiner puts forth for the combination of this art is to assert that:

motivation was supplied for the combination. For example, the teachings of *Gordon* make it obvious to use a smaller amount of calcium ion in the method of *Waitman* in order to avoid imparting the flavor of the final product. *Olliver* was relied on to further evidence the conventionality of using fresh fruit as opposed to cooked fruit as preferred, but not required, by *Waitman*. These are the only teachings from *Olliver* and *Gordon* relied on in this rejection and, therefore, the differences in the specific processes taught by each do not defeat the rejection.

(Emphasis added.) The emphasized language above is precisely Applicants' point. The MPEP admonishes that a "prior art reference must be considered in its entirety, i.e., as a whole,

including portions that would lead away from the claimed invention." Section 2141.02.VI. It is well-established law that it is improper to combine references where the references teach away from their combination and that the totality of the prior art must be considered. *In re Grasselli*, 713 F.2d 731, 743, 218 U.S.P.Q. 769, 779 (Fed. Cir. 1983). See also, *In re Hedges*, 783 F.2d 1038, 228 U.S.P.Q. 685 (Fed. Cir. 1986).

In light of all of the above, and for reasons previously stated, Applicants request that Examiner withdraw the rejection of Claims 1, 14, and 15 wherein Examiner asserts the *Waitman*, *Gordon*, and *Olliver* prior art in combination to support a 35 U.S.C. §103(a) rejection.

Examiner continues to reject Claims 2 and 3 under 35 U.S.C. §103(a) as being unpatentable over *Olliver*, as previously applied, and in further view of *Ross*, U.S. Patent No. 3,185,576. This rejection is respectfully traversed.

As noted above, *Olliver* does not disclose all of the limitations of Claim 1. Consequently, *Olliver* cannot be combined with *Ross* in the manner suggested by Examiner to support an obviousness rejection.

Further, as Applicants have previously noted, the combination of *Ross* and *Olliver* as proposed by Examiner is not appropriate. For example, Examiner asserts it would have been obvious to combine the heating of the methoxyl pectin solution of *Ross* with the composition of the methoxyl pectin solution of *Olliver*. Yet, *Olliver* specifically teaches that the *Olliver* methoxyl pectin solution should not be heated. Other than the presence of the low-methoxyl pectin, the ingredients used in *Olliver* are completely different from the ingredients used in *Ross*, both in amounts of ingredients used and the types of ingredients added and when. Thus, it is difficult to see how it would have been obvious to take a temperature heating range out of one of the method steps of *Ross* and assert that it would have been obvious to combine this teaching

with *Olliver*, particularly in light of the goal of *Olliver* to prepare a composition "without the application of heat." (See, e.g., *Olliver* at Col. 1, Lns. 27-29). Examiner has yet to explain how such combination is obvious and, as explained at length above, cannot pick and chose single elements from divergent prior art references in support of the rejection. MPEP §2141.02.VI, 2145.X.D.

For the reasons listed above and as previously stated by Applicants, Applicants request that Examiner withdraw the rejection of Claims 2 and 3 under 35 U.S.C. §103 as being unpatentable over *Olliver* in view of *Ross*.

Examiner continues to reject Claims 4 and 5 under 35 U.S.C. §103(a) as being unpatentable over *Olliver* in view of *Ross*, as previously applied, and further in view of *Daravingas*, U.S. Patent No. 6,235,320. This rejection is respectfully traversed.

As noted above and previously, *Olliver* in view of *Ross* does not disclose all of the limitations of Claims 1, 2, and 3 on which Claims 4 and 5 depend. Consequently, *Olliver* and *Ross* cannot be combined with *Daravingas* in the manner suggested by Examiner to support an obviousness rejection of Claims 3 and 4.

Further, Examiner continues to propose combining the teachings of a method for making table jelly for housewives without the addition of heat (*Olliver*) with another method for making stabilized jelly fillings for filling cakes and cookies under extrusion (*Ross*) with a method for making yogurt products having a plurality of layers at various viscosities (*Daravingas*). Each one of these prior art disclosures lists very specific processing steps and ingredients with few similarities between the methods and starting materials. Applicants assert that it is improper for Examiner to pick and choose specific ingredients and processing steps taken out of context from these three divergent teachings in support of an obviousness rejection of Applicants' claimed

invention. *See, e.g., In Re Fritch, Id.; In Re Ratti, Id.* The *Daravingas* method alone comprises a step for preparing a yogurt base, followed by a de-aeration step, followed by a heating step, followed by a homogenization step under high pressure, followed by a pasteurization step, followed by a cooling step, followed by addition of a culture in fermentation step, followed by a mixing step, followed by a cooling step, followed by another mixing step, followed by separate filler addition steps. (*See Figure 1*). Out of all of this disparate teaching, Examiner plucks the phrase "Xanthan" out of an optional ingredients list for the yogurt base to assert that such teaching from *Daravingas* would have obviously been combined with the completely divergent methods, ingredients, and objectives of the *Olliver* and *Ross* references. Other than the fact that the *Daravingas* patent does contain the word "Xanthan," Applicants respectfully request that Examiner explain how such combination would have been obvious.

In response to the above, Examiner asserts that *Daravingas* "is relied on merely for the teaching that it was known in the art to use Xanthan gum in food sauces for the purpose of achieving a final product with good viscosity and consistency. The other limitations that Applicant argues that *Daravingas* does not teach are taught by the *Olliver* and *Ross* references." Again, Applicants ask Examiner to address those limitations that are taught by *Daravingas*, *Olliver*, and *Ross*, and explain how such divergent teachings can be combined as obvious. Absent such explanation, Applicants respectfully request that the rejection of Claims 4 and 5 as being unpatentable over *Olliver* in view of *Ross* and further in view of *Daravingas* be respectfully withdrawn.

For the reasons listed and as previously stated by Applicants, Applicants request that Examiner withdraw the rejection of Claims 4 and 5 under 35 U.S.C. §103(a) as being

unpatentable over *Olliver* in view of *Ross*, as previously applied, and further in view of *Daravingas*.

Examiner continues to reject Claims 9-11, 16 and 17 under 35 U.S.C. §103(a) as being unpatentable over *Olliver* in view of *Ross*, as previously applied, and in further view of *Baker* and *Waitman*. This rejection is respectfully traversed.

As noted above and previously, *Olliver* in view of *Ross* does not disclose all of the limitations of Claims 1 and 15, on which Claims 9-11 and 16-17 depend, respectively. For this reason alone, the rejection of Claims 9-11, and 16-17 should be withdrawn.

Aside from the above, Examiner asserts that, while *Olliver* does not disclose the addition of frozen fruit, the *Baker* and *Waitman* references do. In making this assertion, Examiner avoids the limitations that are actually expressed in the rejected claims -- namely, that the addition of fruit is of a frozen fruit (Claims 10 and 16) and that the addition of the fruit "reduces the temperature of the mixture to a point below which cooking of fresh fruit will occur" (Claims 9 and 17). *Baker* discloses the use of frozen fruit juices, while *Waitman* teaches the addition of "cooked fruits" (Col. 5, Ln. 58). Thus, a first contradiction arises in that one piece of art teaches the use of frozen fruit juices while the other piece of art teaches the use of cooked fruit. It is difficult to understand how such divergent teachings can be used for the point of adding a frozen fruit to a mixture. Further, neither *Waitman* nor *Baker* teach the limitation that the addition of such frozen fruit reduces the temperature of the mixture to a point below which the cooking of said food pieces will occur. How any of this can be combined with the underlying prior art (*Olliver*) that requires no heating be used in the entire process to begin with, further shows the inappropriateness of combining these references. For at least the reasons stated above,

Applicants respectfully request that Examiner withdraw the rejection of Claims 9-11, 16 and 17 as being unpatentable over *Olliver* in view of *Ross*, and further in view of *Baker* and *Waitman*.

Examiner continues to reject Claims 13 and 19-21 under 35 U.S.C. §103(a) as being unpatentable over *Ross*, US Patent No. 3,185,576. This rejection is respectfully traversed.

Without citing any evidence to support the assertion, Examiner takes the position that the product produced by the Applicants' process is the same as or obvious from a product produced by the *Ross* process. As noted previously, it is not Applicants' burden to disprove something that is not in the record. Further, the evidence that is in the record clearly disproves Examiner's assertion in this regard. *Ross* specifically teaches a stabilized jelly filling for cakes and cookies that can be subjected to high speed extrusion mechanisms for the purpose of filling cakes and cookies without becoming unstable.

Despite the description of a product that clearly is dissimilar from the product produced by Applicants' process, Examiner also takes the position that the *Ross* disclosure of the use of natural flavorings in this extruded gel is the same thing as Applicants' disclosure of the use of fruit in its process. Applicants respectfully request an explanation of Examiner's rationale as to why the teachings of a jelly filling for cakes and cookies that must remain stable during high speed extrusion can have any relation to the product disclosed and claimed by Applicants and that each would use fruit, even though the use of fruit is not disclosed in *Ross*.

Applicants further refer Examiner to the Affidavit of Colin Pace pointing out that the *Ross* reference produces a product that is not the same as Applicants' claimed product. (Ex. A, ¶____.) In light of this evidence and the arguments stated above, Applicants respectfully request that Examiner withdraw the rejection of Claims 13 and 19-21 under 35 U.S.C. §103(a) as being unpatentable over *Ross*.

CONCLUSION

In light of the amendments and the arguments made by Applicants above, Applicants submit that all existing claims are now in condition for allowance. Applicants respectfully request that Examiner withdraw all rejections with regard to the above-referenced claims in reliance on one or more of the grounds submitted by Applicants.

If there are any outstanding issues that the Examiner feels may be resolved by way of a telephone conference, the Examiner is cordially invited to contact Colin P. Cahoon at 972-367-2001.

The Commissioner is hereby authorized to charge any payments that may be due or credit any overpayments to CARSTENS & CAHOON, L.L.P. Deposit Account 50-0392.

Respectfully submitted by:

A handwritten signature in dark ink, appearing to read 'CPC', is written over a horizontal line.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Barbara Ann Kuhns and Colin Brian Pace	§ § §	GROUP ART UNIT: 1761
FILED: September 11, 2003	§	
INVENTION: Method for Preparation of a Food Sauce	§ § §	EXAMINER: Maureen C. Donovan
SERIAL NO.: 10/659,908	§	ATTY FILE: CWELC.00013

EXHIBIT A -- AFFIDAVIT OF COLIN BRIAN PACE
IN SUPPORT OF RESPONSE TO FINAL OFFICE ACTION
MAILED ON APRIL 4, 2006

BEFORE ME, the undersigned authority, personally appeared Colin Brian Pace, who
being by me duly sworn, deposed as follows:

1. My name is Colin Brian Pace. I am of sound mind, capable of making this
affidavit, and personally acquainted with the facts herein stated.
2. This Affidavit is made on my own personal knowledge, and the statements made
herein are true and correct.
3. I am presently a research engineer in the Technology and Process Development
Department of Welch Foods, Inc. I have worked as a research engineer in the food preparation
process development field, including the preparation of food sauces and jellies, for the past five
(5) years. I hold a Masters Degree in Chemical Engineering from the University of Manchester
Institute of Science and Technology. Consequently, I consider myself skilled in the art of the
process steps involved in the preparation of food sauces and the products produced by such steps.

4. I have reviewed the Response to Final Office Action Mailed on April 4, 2006, prepared on behalf of Applicants and to which my Affidavit attaches as Exhibit A. Consequently, I am familiar with the claims as presently pending before the United States Patent & Trademark Office presented by such Response. I have also reviewed US Patent No. 2,910,365 to *Olliver*, US Patent No. 3,367,784 to *Waitman*, US Patent No. 2,629,665 to *Gordon*, US Patent No. 2,605,188 to *Baker*, and US Patent No. 3,185,576 to *Ross*.

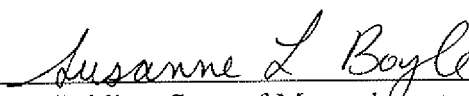
5. The products that would be produced following the teachings of each of the *Olliver*, *Waitman*, *Gordon*, *Baker*, or *Ross* patents would be significantly different than the product that is produced by following the process steps claimed by Applicants herein. Specifically, Applicants' process steps produces a product having a fresh fruit suspension with a unique taste and mouth feel. Applicants' process steps produce a product having a fruit pulp texture that significantly differentiates the Applicants' product from jellies and fruit preparations known in the prior art. The results of Applicants' process steps is unexpected and contrary to the conventional wisdom in the food industry with regard to pectin pre-gels, which are generally considered a defect in pectin-based products such as jellies. By the unique processing steps claimed by Applicants, Applicants control the parameters of the pre-gel and the finished product in order to achieve a unique textural and visual end result. Such result would not be produced by following the teachings of the prior art patents that I have reviewed in preparation for this Affidavit. The *Olliver*, *Waitman*, *Gordon*, *Baker*, and *Ross* patents all have as an objective replicating common jelly or gelatin desserts, where the gel is meant to set up undisturbed and produce a firm, solid gel. All of these patents are using low-methoxyl pectins as has been traditionally taught in order to develop that firm, solid gel. Applicant's claimed invention, on the

other hand, takes the state of the art in a completely different direction and produces an unexpected resultant product.

FURTHER AFFIANT SAYETH NAUGHT.


COLIN BRIAN PACE, Affiant

SWORN TO AND SUBSCRIBED before me on the 1st day of June, 2006.


Notary Public – State of Massachusetts

Susanne L. Boyle
Printed Name of Notary Public

My commission expires: _____

